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# GOVERNMENT POLICY AND FAMILY PLANNING

GEORGE M. SIRILLA, S.J.\*

ON APRIL 1, 1965 Senator Gruening of Alaska introduced in the United States Senate a bill "to implement President Johnson's pledge to seek new ways to deal with the population explosion." This bill, S. 1676, proposes changes in the policy of the government toward population problems. There was the expected negative reaction to this kind of proposal from certain quarters within the Catholic Church. It came as a surprise to many, however, when some Catholic scholars took a position actually supporting certain types of governmental activity possible under this bill.<sup>1</sup> As evidence of the misunderstanding and the complexity of the issues raised by the specter of governmental activity in family-planning problems, one need only refer to the controversy that arose in Illinois when the Public Aid Commission of that state, in 1962, considered using public funds for birth control purposes, including disseminating information and devices regarding artificial birth control.<sup>2</sup> If one considers the different views of Catholic scholars presented last summer during hearings on S. 1676, and the present deliberations of the Papal birth control commission in the light of Vatican II, it would seem that there is room for discussion of this question of governmental policy and family planning.

This paper will examine the opposing testimony of two Catholic scholars on S. 1676 and consider the issues they raise and their arguments, as well as other issues and arguments of interest. The question of our policy with regard to the population problems of other nations, and the question of abortion, raise special difficulties which will not be fully examined at this time. Hence, when the terms

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<sup>1</sup> Robert F. Drinan, S.J., Dean of the Boston College Law School, and Dexter L. Hanley, S.J., Professor of Law at Georgetown Law Center, both have taken the position that Catholics can support tax-supported family-planning clinics if adequate provision is made for methods acceptable to the Catholic conscience. Fr. Hanley's position will be examined in this paper. Fr. Drinan expressed his views recently in a public address given at Loyola College in Baltimore on April 1, 1966.

<sup>2</sup> Rohr, *Birth Control In Illinois*, 1965 CHICAGO STUDIES 31 (Spring).

"family planning" or "birth control" are used herein it should be understood that reference is being made only to our domestic policy and that abortion is not included.

### S. 1676

The bill, as proposed by Senator Gruening, is still under consideration in the Senate, and it consists of four sections. Sections 1 and 2 relate to world population problems. Section 3 relates to domestic population problems, and section 4 calls for a White House Conference on Population in January 1967. Sections 1 and 2 will not be considered in this paper, and section 4 for present purposes may be taken as raising no difficulties apart from those presented by section 3.

Section 3 imposes certain duties on the Secretary of Health, Education and Welfare, and calls for the creation in the Office of the Secretary of an Office for Population Problems to which he may delegate these duties. Among other things, these duties include:

- (3)(a)(1) determining the need for additional programs which relate to population growth and health;
- (3)(a)(3) making policy determinations in the field of population growth;
- (3)(a)(5) keeping the personnel of the department and of the federal, state, and local governments, advised with respect to their duties in implementing such policies and programs;
- (3)(a)(7) cooperating with, and seeking the assistance of, interested public and private institutions, groups, organizations and individuals in carrying out the policies and programs of the United States relating to problems of population growth.

These appear to be the domestic policy provisions of the bill that would present

difficulties for the Catholic conscience. As is evident, they are couched in broad terms, and no mention is made of any particular method for preventing conception or birth in connection with carrying out these policies.

### Conflicting Catholic Testimony

Two Catholic scholars, William B. Ball, lawyer and General Counsel of the Pennsylvania Catholic Conference, and Dexter L. Hanley, S.J., Professor of Law at Georgetown Law Center, testified before Senator Gruening's Subcommittee on Foreign Aid Expenditures of the Senate Committee on Government Operations on August 24, 1965 relative to S. 1676. In their testimony, they developed at some length arguments to support their conflicting conclusions. At the risk of oversimplifying their positions, I will address myself primarily to what I consider the major point of disagreement as drawn from their testimony, and also to some related questions.

#### *Testimony of William B. Ball*

While Mr. Ball indicated approval of the idea of government-sponsored or supported research in connection with population problems, he criticized the bill on the ground that it is "plainly and simply, a bill for the establishing of a domestic and international birth control program and for the creating of permanent federal government organs for the carrying out of the same."<sup>3</sup> He stated that the government should not intervene in the area

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<sup>3</sup> Ball, *Statement Prepared for Presentation Before the Subcommittee on Foreign Aid Expenditures of the Senate Committee on Government Operations*, August 24, 1965, [hereinafter cited as *Statement*]. Copies have been available through the office of Senator Gruening.

of family planning, as by providing birth control services,<sup>4</sup> and he argued on constitutional grounds that, in the administration of such family-planning programs, there will be "serious dangers to civil liberty," and in fact there will necessarily be coercion and violations of human privacy. It would seem, from his testimony, that he rules out, a priori, any possibility of setting up a family-planning program so as to provide individuals with the opportunity to make responsible choices free from coercion.

In developing his argument, he points out that it is the weaker members of society, *i.e.*, the poor and uneducated, for whom these programs would be established under S. 1676. His deduction that coercion would necessarily result is predicated on an analogy he draws with the school prayer cases. He sees those cases as involving the following elements, implying that they would also be applicable to family-planning programs:

(a) sponsorship by government of the practice in question; (b) these practices involving matters in the area of the personal; (c) a weak member of society (the child) cast in a relationship with government (through the school); (d) a general attitude in the community favoring the practices; (e) an exemption procedure available to the child upon the basis of conscientious objection.<sup>5</sup>

And he further states:

The Supreme Court . . . found coercion to be inherent in the child-state relationship, even though the state's role was almost wholly passive, even though the project was broadly considered good for children and needful for society, and even though the child could be exempt by

claiming his privilege of non-participation.<sup>6</sup>

Whether or not this is a correct statement of the ruling in the school prayer cases will be discussed later. It is Mr. Ball's position that the poor person vis-à-vis any family-planning program supported by the government would be in a situation analogous to that of the child sitting in a classroom in front of the teacher, and he claims similar coercion will necessarily be imposed on the poor adult so as to deny freedom of choice in the matter of family planning. Presumably, what Mr. Ball is suggesting is that the poor person will be forced to decide to limit his family size against his will, and/or to use some birth control method or device selected not by him but by some government or public official. Thus, his argument continues, that even though the government's role may be argued to be passive (as in the school prayer cases), the *de facto* situation in the clinic, for example, will be coercive.

He further urges that "where government is to act in matters closely involved with personal liberty, the rational basis for its action must be firmly—not loosely—established."<sup>7</sup> Here he implies a "sig-

<sup>4</sup> *Id.* at 3.

<sup>7</sup> *Ibid.* Mr. Ball also refers to the following statement in Mr. Justice Goldberg's concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965):

"In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged . . . simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling. . . .'

<sup>4</sup> *Id.* at 6.

<sup>5</sup> *Id.* at 2, 3.

nificant encroachment upon personal liberty" in any government supported family-planning program. He also seems to imply that the birth control services available in such programs would necessarily exclude methods acceptable to the Catholic conscience, and he sees invasions of privacy resulting from questioning of the recipient or patient by public officials.

Mr. Ball does not clearly specify whether the constitutional protection of freedom from coercion and invasion of privacy, which he speaks of, would derive from the free exercise clause of the first amendment, or from a right of privacy, such as was developed in the *Griswold* case which struck down the Connecticut birth control law,<sup>8</sup> or whether such protection would be derived from some other source.

*Testimony of Dexter L. Hanley, S.J.*

Father Hanley addressed the Family Law Section of the American Bar Association on August 9, 1965 in Miami Beach regarding the problems of public policy arising out of tax-supported family planning. In that address, he stated that "I do believe that there are legitimate reasons not only to tolerate but to support [such] tax-supported programs." Almost immediately after he delivered this paper, he was invited to testify before Senator Gruening's subcommittee. In his testimony, Fr. Hanley submitted his Miami address together with a statement especially prepared for the occasion and relating "to some of the wider questions which are involved in the legislative process underlying such proposals." Undoubtedly,

his address at Miami met with such prompt and interested response from Senator Gruening's subcommittee because of Fr. Hanley's statement that the position he took was "with full respect and adherence to traditional Catholic teaching on the questions of morality which are involved in discussions of family planning."<sup>9</sup>

His argument begins with a statement of certain fundamental moral-legal principles such as the following: that law and morals are not coextensive; that the purpose of law is the common or social good and not private morality; and that laws should not prohibit acts merely because they are immoral. Thus, regarding the question of the morality of birth-control methods, he states that: "Whether the moral positions can change or not, the legal issue is quite a separate one, dealing as it does with social values and problems."<sup>10</sup>

As was the case with Mr. Ball's approach, Fr. Hanley's approach places paramount importance on the right of each person freely to choose and act in matters of such intimacy.

With these principles as a foundation, his argument proceeds as follows: government may intervene in the matter of family planning if there is "common acceptance, the consensus if you will, that the matter of family planning is a legitimate public concern. Today, it seems to be."<sup>11</sup> Thus, given that the government's concern in this area is legitimate, the end

The law must be shown necessary, and not merely rationally related, to the accomplishment of a permissible state policy."

<sup>8</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>9</sup> Address by Dexter L. Hanley, S.J. before the Family Law Section of the American Bar Association, August 9, 1965, [hereinafter cited as *Address*].

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

or goal of such regulation will also be legitimate and the question then is a matter of choosing proper means. Among such means would be government-supported research (also approved by Mr. Ball), and the distribution of information, services, and materials on methods of practicing birth control. Inasmuch as there is disagreement at present on the morality of some known methods and devices, Fr. Hanley maintains that in any program of this type the government must not approve or prefer any particular method or device to the exclusion of others, and the individual's freedom to choose must be preserved. On this latter point, it would be necessary that the program also provide information regarding methods acceptable to the Catholic conscience. If these conditions could be met, then Fr. Hanley would conclude that the common good is not harmed, and that a Catholic therefore would neither have to oppose nor simply tolerate such tax-supported programs, but he may in good conscience even go so far as to "support the aims of the program, encourage wider research and concern over related problems, and permit the use of tax-supported funds even where the individual choice is in favor of means not approved of."<sup>12</sup>

#### **Freedom from Coercion and the Right of Privacy**

While Fr. Hanley and Mr. Ball both recognize the fundamental importance of freedom from coercion and from invasion of the privacy and intimacy of the marital relationship, Mr. Ball concludes that in any government program of the type considered "coercion necessarily results and

violations of human privacy become inevitable,"<sup>13</sup> whereas Fr. Hanley presupposes that it is possible for family-planning programs to be established and operated so as to preserve the individual's freedom of choice in this area of privacy.

Let us first examine more closely Mr. Ball's contention that "coercion necessarily results" and his suggested analogy with the school prayer cases. From his statements, one would be led to conclude that these cases turned on violations of the free exercise clause of the first amendment, as a result of the alleged coercion of the children to pray. The question of possible or actual coercion, however, was not part of the rationale of these cases. They were decided, rather, on the basis of the establishment clause.<sup>14</sup> The Supreme Court held that the activity in question, prayer, was inherently or essentially religious and the purpose of the program was religious, thus amounting to an establishment of religion by the state, in violation of the establishment clause of the first amendment (as applied to the states through the fourteenth amendment).<sup>15</sup>

It must be concluded, therefore, that the school prayer cases do not provide authority for Mr. Ball's coercion theory. In fact, it may be argued whether there is even any implicit authoritative statement by the Court that coercion of the children would necessarily result, or be unavoidable. In this connection, it might

<sup>13</sup> Ball, *Statement*, *supra* note 3, at 4.

<sup>14</sup> *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>15</sup> *Abington School Dist. v. Schempp*, *supra* note 14, at 205; *Engel v. Vitale*, *supra* note 14, at 424.

<sup>12</sup> *Ibid.*

be noted that in his dissent in the *Schempp* case, Mr. Justice Stewart suggested the possibility of a school prayer program wherein there would be no coercion.<sup>16</sup> Since the issue of coercion was not essential to the Court's decisions in these cases, it is not seen how it can be concluded that the Court rejected this suggestion of a coercion-free program.<sup>17</sup>

In the light of the foregoing, it may be asked how Mr. Ball finds authoritative support for his five-part coercion theory in these cases. If his reference to these cases implicitly meant that he felt government-supported family-planning programs would be a violation of the establishment clause of the first amendment and thereby indirectly coerce the consciences of the minority,<sup>18</sup> it would still be

necessary to show how the activity in question, in its purpose and primary effect, is one that advances or inhibits religion.<sup>19</sup> It may be seriously questioned whether a family-planning program (especially one wherein all known and acceptable methods are available, including the method of periodic continence or rhythm) could be considered religious either in its purpose or primary effect. While it may raise questions of morality and ethics for the individual conscience, relative to the various methods of family planning available, it may be questioned how there would be any governmental establishment of a religious belief or tenet, any more than there would be, for example, in the government's present policy about nuclear weapons, the draft, or dissolution of marriage. These examples all involve moral questions (or could, for the individual conscience), and the "power, prestige, and financial support of government" behind some particular moral position or positions, but the activity in question here is not essentially religious, and it is not seen then how the resultant indirect coercive pressure on minorities to conform would thus render the activity

<sup>16</sup> *Abington School Dist. v. Schempp*, *supra* note 14, at 318-20 (dissenting opinion).

<sup>17</sup> The following statement from the opinion in the *Engel* case was incorporated into the Court's opinion in the *Schempp* case and indicates the lack of relevance of the question of coercion to the Court's decisions in these cases.

"Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Id.* at 221 citing *Engel v. Vitale*, *supra* note 14, at 430.

<sup>18</sup> In the *Engel* case, Mr. Justice Black, in the majority opinion, further stated:

"This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is

plain." *Engel v. Vitale*, *supra* note 14, at 430-31.

<sup>19</sup> This was the test for religious activity affirmed in the *Schempp* case:

"The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Abington School Dist. v. Schempp*, *supra* note 14, at 222.

in question an unconstitutional infringement of first amendment guarantees and liberties.

Since Mr. Ball's coercion theory would seem untenable if predicated on the school prayer cases or the first amendment, let us now examine this theory as it might be argued to proceed from a constitutional right of privacy in the marital relationship, such as was developed in the *Griswold* case.<sup>20</sup> The law held invalid in that case forbade entirely the use of contraceptive devices, leaving periodic continence as the only legal means for preventing conception. Hence, the people were *prohibited* by the *criminal* law from having any free, legal choice in this matter. It is this express denial in the law of other options that was held to be, or to give rise to, an unconstitutional invasion of the right of privacy.

Mr. Ball, in his argument, might be implicitly urging that while S. 1676 does not prohibit the use of certain methods for preventing conception, the poor would be necessarily required to use certain methods against their will, and this would achieve the same unconstitutional effect as though certain methods were expressly outlawed in the bill, as in the *Griswold* case. It would appear that Mr. Ball would not be satisfied by an amendment to S. 1676 which would expressly require that government support will only go to programs and clinics offering information and services on all known and acceptable methods, including rhythm, because he would still feel that in the administration of such programs government officials or others will coerce the poor and invade their right of privacy in the marital rela-

tionship. If such coercion and invasion of privacy would be absolutely necessary in any such government program, then his argument would seem to raise a serious constitutional question. S. 1676 may be distinguished from the Connecticut birth control law, however, in that S. 1676 does not favor any particular method or methods as did the Connecticut statute, and could be amended as suggested. What then of the question of coercion and invasion of privacy in its administration? Initially, it might be asked whether Mr. Ball's view is unduly prejudiced by his own impressions of some birth control clinics? If officials or others connected with such clinics might abuse their authority in some cases so as to encroach upon the patient's privacy, should such a possibility be relied upon to oppose the bill initially, or should reliance be placed on the means and processes presently available to protect against such abuse once the bill has been passed? It might be further asked whether a system of policing the program for such abuses could be incorporated in the bill, or developed later by private groups?

It might be noted that the poor, in recent years, are becoming more aware of their legal and constitutional rights, and more public services are being provided to them which, among other things, help them to ascertain what their legal rights are and to assert and protect them. Thus, it may be questioned whether a general practice of coercion and invasion of the right of privacy of the poor in birth control programs, as feared by Mr. Ball, would occur and, if so, whether it could continue without being effectively challenged.

<sup>20</sup> *Griswold v. Connecticut*, *supra* note 8.



It would appear then that the answer to the question of whether the bill should be opposed or favored or treated permissively should depend, at least partly, on the present need for the poor in this country to be given help by the government in their family planning. As will be discussed later, the Catholic Church, speaking through the Council Fathers at Vatican II, has recognized that governments do have responsibilities in connection with their own population problems, and that human beings should receive help in their family planning, at least to the extent of receiving information and education about approved methods of preventing conception. As to approved methods, it might be noted that since Mr. Ball's testimony was given, there has developed a controversy among scholars within the Catholic Church on the present status of the morality of certain contraceptive practices previously held objectionable.<sup>21</sup> The fact of this present controversy, and the continuing deliberations of the Papal birth control commission, could have some effect on the Church's official position on certain methods, especially those involving the use of the "pill."

Thus, it must be asked whether there is presently a population problem among the poor in this country.<sup>22</sup> If there is,

<sup>21</sup> McCormick, *Notes on Moral Theology*, 26 THEOLOGICAL STUDIES 596-662 (1965); Thomas, *What Did the Council Say on Contraception?*, 114 AMERICA 294-96 (1966); Ford, *More on the Council and Contraception*, 114 AMERICA 553-57 (1966).

<sup>22</sup> This would be a question for demographers and other scholars working on these problems. See *Hearings on S. 1676 Before the Subcommittee on Foreign Aid Expenditures of the Senate Committee on Government Operations*,

then it seems that the taxpayer, including the Catholic, should be able to accept the proposition that the government can act in this area and go beyond merely supporting research programs. The constitutional objections raised by Mr. Ball would not seem to present any insurmountable difficulties to government-supported family-planning programs carefully arranged, as suggested, and policed, if necessary.

### Public Morality

A common moral objection to birth control programs sponsored by public funds is that the government is endorsing public immorality, and for that reason such programs should be opposed. This was an objection advanced in the Illinois controversy referred to above, against "the use of public agencies and of public funds to encourage and support artificial contraception. . . ."<sup>23</sup> This argument runs as follows: citizens have an interest in the common good and a duty to prevent the state from embarking on a policy of public immorality, since that would harm the common good; artificial contraception is immoral, *ergo*. . . .

This objection was not specifically raised by Mr. Ball, but it seems that it was at least implicitly considered by Fr. Hanley. As a prerequisite to his approval of any government-supported family-planning program, Fr. Hanley stipulates that the "government should not imply a

89th Congress, 1st Sess. 440-69 (1965). Another reference would be the welfare rolls of the large cities, listing the number of children in each family on welfare. See Moynihan, *A Family Policy for the Nation*, 113 AMERICA 280-83 (1965).

<sup>23</sup> Kenealy, *Law and Morals*, 9 CATHOLIC LAW. 200-10, 264 (1963).

preference for any particular method,"<sup>24</sup> and that "programs must provide adequate and effective counseling in the areas of periodic continence."<sup>25</sup> The program would not then be identified with any particular method, such as those commonly understood by the expression "artificial contraception," and which might be challenged as immoral.

There may be an analogy with government-supported domestic relations courts bearing on this problem of public immorality and birth control programs. In providing public funds for these courts, a state is not advocating dissolutions of marriages either by divorce, separation, or annulment. The government in question is simply establishing means and processes whereby a party's own decision to terminate obligations of the marital contract may be effectuated in civil society. Since the government is neutral in such cases, it is not objectionable as hurting the common good. The Catholic Church, while opposed to divorce on moral grounds, recognizes and permits separations and annulments as morally proper under certain circumstances.

Although this analogy was not referred to in Fr. Hanley's testimony, it would appear that it is this type of government neutrality as to the available options (at least some of which are acceptable to the Catholic conscience) which enables him to conclude that the common good would not be harmed by the kind of family-planning program he approves, and that

<sup>24</sup> Hanley, *Address*, *supra* note 9, at 9.

<sup>25</sup> Hanley, *Statement Prepared for Presentation to the Subcommittee on Foreign Aid Expenditures of the Senate Committee on Government Operations*, August 24, 1965. Copies have been available through Senator Gruening's office.

Catholics therefore do not have to oppose such programs.

Unable to show how the common good is harmed by political toleration of birth control, it is not incumbent upon those who hold strong convictions to oppose tax-supported programs, even where these involve procedures not morally acceptable.<sup>26</sup>

While norms of private morality may have social dimensions so affecting the common good as to justify opposition to public programs, private moral judgments regarding methods of family planning do not provide a basis for opposition to government programs.<sup>27</sup>

Referring to this last statement of Fr. Hanley, it should be noted that he indicates there may be some "norms of private morality" which do have "social dimensions so affecting the common good as to justify opposition to public programs." From other parts of his testimony, it is clear that he would consider abortion, for example, to have such social dimensions "as to justify opposition to public programs" involving this practice. A related question here is the constitutional right of each person not to be deprived of life without due process of law.

### Another Approach

The concern of the Catholic Church with population problems of the world is evident from the deliberations of Vatican Council II and from the ensuing *Pastoral Constitution on the Church (Gaudium et Spes)*. The Council Fathers explicitly recognize the responsibilities of governments regarding these problems:

Within the limits of their own competence, government officials have rights and

<sup>26</sup> Hanley, *Address*, *supra* note 9, at 6.

<sup>27</sup> *Id.* at 9.

duties with regard to the population problems of their own nation. . . .<sup>28</sup>

They further recognize that in carrying out these responsibilities, governments must not interfere with the freedom of the parents to decide themselves how large their family should be.

For in view of the inalienable human right to marry and beget children, the question of how many children should be born belongs to the honest judgment of parents. The question can in no way be committed to the decision of government.<sup>29</sup>

The Council gives express approval and encouragement to research and studies on population problems,<sup>30</sup> and notes the importance of educating the people in the matter of methods of family limitation.

Human beings should also be judiciously informed of scientific advances in the exploration of methods by which spouses can be helped in arranging the number of their children. The reliability of these methods should be adequately proven and their harmony with the moral order should be clear.<sup>31</sup>

In the popular, recently published, book, *The Documents of Vatican II*, (from which the above excerpts are taken), there are interesting editorial footnotes to the last two passages referred to:

The tone of this passage is clearly different from that of the section in 'Mater et Magistra' (188-92), dealing with population problems and birth control. The text admits the reasonableness of formulating an official policy on population growth in a nation. It can be noted that in the United States a small number of Catholic specialists have been at work for some time on the questions raised in this

passage. Some systematic investigations have been conducted at Catholic universities, notably Georgetown and Notre Dame.<sup>32</sup>

This sentence lends official sanction to such efforts as the family-planning clinics sponsored in a growing number of dioceses in the United States. The approval given here would obviously not extend to programs designed to *encourage* limitation of births by recourse to abortion or similar morally unacceptable methods.<sup>33</sup>

In this same connection, reference might also be made to the introduction to *Gaudium et Spes* given in this book by Donald R. Campion, S.J.

*Gaudium et Spes* does not rest content with warning against immoral efforts to combat the population problems, or with urging more or less realistic programs for increased food production or better land distribution in order to meet the needs of rapidly growing populations. Here we see a new emphasis added to the teaching of a document like John XXIII's *Mater et Magistra*. The Council Fathers now recommend that 'men should be discreetly informed. . . .'<sup>34</sup>

It would not seem unreasonable, therefore, to argue that the Council is calling upon governments to take steps, where indicated, to see that their people are informed about methods of family planning and limitation, and it is suggested that this could provide a starting point for the question under consideration.

Assuming there is a population problem among the poor in this country,<sup>35</sup> it may be argued from the teachings of Vatican II that the government can and

<sup>28</sup> ABBOTT, THE DOCUMENTS OF VATICAN II, 301 (1966).

<sup>29</sup> *Id.* at 302.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* See *id.* at 302, n.270.

<sup>33</sup> *Ibid.* See *id.* at 302, n.271. (Emphasis added.)

<sup>34</sup> *Id.* at 196.

<sup>35</sup> This statement is not meant to imply that what is assumed could not be proved or has not already been proved.

indeed should support programs providing education to the poor regarding methods of family planning. This activity might also be defended legally as a proper exercise of the government's responsibility to promote the common good by providing for the education of its citizens in matters of crucial importance to them. A further argument could proceed from the correlative right of the poor to receive assistance from the government, at least in the form of education as to matters so essential to their well-being,<sup>36</sup> and especially in an otherwise affluent society. The value that would be promoted, among others, would be imparting knowledge to the poor, while the actual decision as to family size and method would be left to the parents.<sup>37</sup>

It would follow then that if there is in fact a population problem, Catholics not

only could but should give support or approval to government-sponsored educational programs of this type, at least to the extent of morally acceptable methods. As discussed above, the inclusion of other methods would not necessarily raise any greater problems for the Catholic conscience than would domestic relations courts. The remaining difficulty would be how far the government could go in helping the poor to carry out their decisions. Could the government, for instance, legitimately make special economic assistance available to the poor for this purpose, as in the nature of public welfare, and then let the poor go to a doctor or private clinic of their own choosing? This may require that Catholics set up a system of clinics of their own, but it does not seem that anything immoral would necessarily be involved, or that anyone's constitutional rights would necessarily be deprived.<sup>38</sup>

The government would not be approving any particular method or device but would simply be educating the poor as to various methods so that they in turn could make a free, informed, and responsible decision. Even though the government itself would not be directly involved in setting up or operating clinics under this scheme, there would, of course, still be involved indirect support of such clinics by the government. Yet, whether public funds go directly or indirectly to the establishment and operation of clinics (if directly, it is presumed they will be of the

<sup>36</sup> This argument is suggested from the concurring opinion of Mr. Justice White in *Griswold v. Connecticut*, *supra* note 8, at 503. In holding the law in question invalid, Mr. Justice White made reference to a right of the poor to receive some kind of assistance in family planning:

"And the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control."

<sup>37</sup> ABBOTT, *op. cit. supra* note 28, at 254. This reference pertains to factors to be considered by the family in making its decision:

"They will thoughtfully take into account both their own welfare and that of their children, those already born and those which may be foreseen. For this accounting they will reckon with both the material and the spiritual conditions of the times as well as of their state in life. Finally, they will consult the interests of the family group, of temporal society, and of the Church herself."

<sup>38</sup> *Id.* at 302, n.271. It might also be noted that Catholic birth control clinics were advocated by Catholic writers as early as 1939. See O'Connell, *Birth Control Clinics Needed*, 101 AMERICAN ECCLESIASTICAL REVIEW 246-54 (1939).

type suggested by Fr. Hanley), it does not appear that anything would necessarily be involved essentially different constitutionally or morally from the use of public funds to set up and maintain a system of domestic relations courts.

### Some Remaining Questions

#### *Abortion*

The traditional argument against abortion is, of course, that the life of another is involved and must be respected. While both Fr. Hanley and Mr. Ball objected in their testimony to this practice, neither one developed in any great detail an argument supporting the proposition that the life of another is involved. It would seem that for Americans today, the case against abortion could best be demonstrated by scientific evidence of the separate existence of human, personal life in the period of gestation.<sup>39</sup> This would make it easier to take the argument out of the reach of pragmatism, so that even if it could be shown that social good would or might result from an approved abortion procedure (as practiced in Japan, for example), the procedure would still have to be outlawed as unconstitutionally depriving another of his right to life.

#### *International Policy*

The question of our policy toward the population problems of other nations (*e.g.*, the underdeveloped nations of Africa, Asia, and South America) is too complicated with political, moral, and social aspects for any serious consideration within the limits of this paper. It was only briefly referred to by Fr. Hanley and Mr. Ball. Fr. Hanley raised the point that massive government programs of this type

might in some foreign countries violate "social, religious, and traditional objections [of those peoples] to family limitation."<sup>40</sup> And Mr. Ball intimated the possibility of a racist misinterpretation of such programs.<sup>41</sup>

#### *Who Should be The Recipients?*

This question was not expressly discussed by Fr. Hanley or Mr. Ball, but it was hotly debated in the Illinois controversy referred to above.<sup>42</sup> In the proposed programs, should advice and services be given to all women, including the unmarried? This suggestion was objected to in the Illinois controversy on the ground that it would promote promiscuity. If the programs are limited to married women living with their husbands, this objection would be avoided. But it might be asked whether such a limitation would be realistic, particularly as to the "living with their husbands" qualification. It is a well-known fact that in many of the poverty-stricken large families, the mother runs the family and there is no father regularly living in the house.<sup>43</sup> Should the mothers in such families be excluded from the programs under consideration? If so, the programs may then be self-defeating as to certain segments of the poor population. On the other hand, if such mothers are to be included, would the objection of promoting promiscuity be valid and unanswerable?

#### *The Argument from Cooperation*

There is the final question of the morality of cooperating in the material sin of another. This relates to the extent of the

<sup>39</sup> McCormick, *supra* note 21, at 602.

<sup>40</sup> Hanley, *Address, supra* note 9, at 14.

<sup>41</sup> Ball, *Statement, supra* note 3, at 6.

<sup>42</sup> Rohr, *supra* note 2, at 48-49.

<sup>43</sup> Moynihan, *supra* note 22, at 282.

role, if any, a Catholic may take in establishing, supporting, or assisting in any way in the programs suggested. The traditional argument here would be: that a Catholic is not permitted to cooperate in the commission of the material sin of another; certain methods of family limitation are considered by the Church to be immoral and hence *material* sins (not necessarily subjective, culpable sins); thus Catholics cannot give any support to programs wherein these objectionable methods would be practiced.<sup>44</sup> This issue was not explicitly referred to either by Fr. Hanley or Mr. Ball in their testimony, no doubt because a Senate subcommittee would not be a particularly appropriate forum for advocating such an approach. Any critical examination in depth of this argument and its applicability or not to all possible types of government sponsored family-planning programs would be well beyond the scope of the present undertaking. It does seem, however, that it would raise a serious question as to certain types of programs, for example, those compelling the use of some morally unacceptable method. Yet, on the other hand, it does not seem that it should pose an insurmountable difficulty to government programs wherein the main objective is to educate and impart information, as suggested above, and without favoring or advocating any particular method. In such programs the principal value could be considered to be elevating the poor people through education and knowledge to a position wherein they can make free, intelligent, and informed choices.

It might be interesting to consider whether the argument from cooperation might not in some cases be applicable to non-action on the part of the citizen. For example, if Catholic voters refuse to support a government program providing family-planning information and education to the poor, would they perhaps by such non-action be contributing to or cooperating in the continuation and perpetuation of the evil or material sins of the *status quo*, wherein the poor remain ignorant about these matters and without adequate Christian help from others? Might the Catholic not feel in conscience that no matter what decision he makes, he might in some way be cooperating in some material sin or evil, either that of continuing the present conditions, or that of the objectionable or questionable use of some contraceptive method? In that situation, could the Catholic not make an honest decision in good conscience to support a government-sponsored family-planning program, either one wherein education and information alone would be furnished, or one wherein services also were provided but subject to the conditions discussed above?

If one considers the present status of the morality of certain contraceptive methods, such as the use of the "pill," and the conflicting opinions among well-known Catholic scholars and theologians referred to above, it would appear that official Catholic opinion might not be closed on the question of the morality of the unselfish use by married couples of certain methods previously objected to. In that case the argument from cooperation would seem to be directly affected.

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<sup>44</sup> Lynch, *Notes on Moral Theology*, 25 THEOLOGICAL STUDIES XXV 232-33, 252 (1964).